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In the Supreme Court of the United States

OCTOBER TERM, 1924

IN EQUITY

(No. 3, Original)

STATE OF NEW MEXICO, COMPLAINANT,

VS.

STATE OF TEXAS, DEFENDANT.

DEFENDANT'S REPLY TO BRIEF OF L. M. CRAWFORD, AMICUS CURIAE.

STATEMENT.

In order to make an intelligible statement of the issues involved by the motion of L. M. Crawford to appear as amicus curiae, and the motion of the complainant, the State of New Mexico, to direct testimony and take additional testimony, and the motion of L. M. Crawford, amicus curiae, to be permitted to orally argue the case before this court, a brief resume of the issues involved in the original case becomes here necessary.

I.

This suit was filed in this court on the 31st day of January, A. D. 1913, by the State of New Mexico, complainant, against the State of Texas, defendant. Complainant alleged that by virtue of the propositions made by Congress in the Act of September 9, 1850, and by the acceptance thereof by the State of Texas, as shown in exhibits attached to said bill of complaint, the channel of the Rio Grande from the point where the 32nd

parallel of latitude intersected said channel in the year 1850, as the same existed at that time, became and was the western and southwestern boundary of said State of Texas from said 32nd parallel to the Gulf of Mexico, AND THAT SAID BOUNDARY HAS REMAINED UNCHANGED TO THE PRESENT TIME.

Complainant further alleged that under the treaty with Mexico known as the Gadsden Treaty, signed December 30, 1853, the channel of the Rio Grande between the parallel of 32 deg. north latitude and parallel 31 deg. 47 min. north latitude became and was the boundary between the State of Texas and the territory of New Mexico, AND NOW IS THE BOUNDARY BETWEEN THE STATE OF TEXAS AND THE STATE OF NEW MEXICO, and in complainant's prayer is found the following: "And that the middle of the channel of the Rio Grande as it existed in the year 1850 and as shown upon the map hereinbefore referred to, which is attached hereto and marked Exhibit "C," be by this Honorable Court decreed to be the true boundary line between the State of New Mexico and the State of Texas between the parallel 32 deg. north latitude and the parallel 31 deg. 47 min. north latitude." * * *

II.

On April 21, 1913, the State of Texas, defendant, on leave of court filed its answer and cross bill, wherein defendant admitted that the boundary of the State of Texas on the north commenced at a point at which the meridian of 100 deg. west from Greenwich is intersected by the parallel of 36 deg. 30 min. north latitude and runs from said point due west to the meridian of 103 deg. west from Greenwich, thence the boundary runs due south to the 32nd deg. of north latitude, thence on said parallel of 32 deg. north latitude to the Rio Grande as it existed in the year 1850, and thence with the channel of said river to the north of Mexico. Defendant admitted that the portion of the present State of New Mexico lying to the west of the channel of the Rio Grande as it existed at the date Texas was admitted into the Union, and on September 9, 1850, and on December 13, 1850,

and between the parallel of 31 deg. 47 min. north latitude and the parallel of 32 deg. north latitude became a portion of the United States and now comprises the part of the territory of the State of New Mexico, and that the channel of the Rio Grande between the parallel of 31 deg. 47 min. north latitude and the parallel of 32 deg. north latitude at the dates herein mentioned became and was the boundary of the State of Texas and the territory of New Mexico, AND NOW IS THE BOUNDARY BETWEEN THE STATE OF TEXAS AND THE STATE OF NEW MEXICO. In its prayer the defendant, the State of Texas, prayed "That the court decree that the boundary line between the State of Texas and the State of New Mexico on that part of same between parallel 31 deg. 47 min. and 32 deg. north latitude, be declared to be the middle of the channel of the Rio Grande as it actually existed in the year 1850. * * *"

III.

Thus it will be seen that the only issue between the complainant and the defendant was the determination of the position occupied by the Rio Grande in 1850. While it is true that the State of New Mexico, complainant, prayed that it have such further or other relief as the nature of the case may require and to the court shall seem meet and proper, yet in paragraph 4 of the complainant's bill of complaint (Rec., Vol. I, p. 3) is found the following language: "And that said boundary has remained unchanged to the present time." Thus it will be seen that the pleadings of both the complainant and defendant were drawn upon the theory that the Rio Grande of 1850 was the boundary line between the State of Texas and the State of New Mexico between 32 deg. north latitude and 31 deg. 47 min. north latitude, and upon the theory that if the river had at any time changed its course or channel from 1850, that the same was an avulsive change and that no change had occurred through natural or gradual processes by accretion or erosion.

The evidence adduced before the commissioners all points to the inevitable conclusion that the Rio Grande between the 32nd

deg. north latitude and 31 deg. 47 min. north latitude was an avulsive river. With few exceptions, between the years 1850 until the building of the Elephant Butte Dam the entire valley was flooded every year. It is shown that during this time the river has occupied many and various channels. One of the engineers, Mr. R. J. Owen, employed by the defendant, testified that he had undertaken to run out all of the various old channels found in the valley, but there were so many of them they did not even map them all. (Rec., "Additional Testimony," p. 41.) The theory of the State of New Mexico is, both in its pleadings and evidence, that every change made by the river between the years 1850 up to the time of the filing of the suit, was an avulsive change, and this theory is accepted by defendant, State of Texas.

IV.

However, on the 14th day of April, 1924, the complainant, the State of New Mexico, filed in this court its motion to be allowed to introduce certain additional testimony to correct and supplement the testimony of R. J. Owen, who testified upon the original hearing of this case as a witness for the State of Texas. Attached to the said motion was the affidavit of R. J. Owen (Rec., Vol., "Additional Testimony," pp. 2-5, inclusive), and here in said affidavit for the first time in the case is raised any issue that the river had ever changed its position except by avulsive changes. However, Mr. Owen states in the affidavit substantially that between the south boundary line of the Canutillo Grant and Piedras Paradas there are no indications on the ground of a river channel along the line indicated on the map (Defendant's Exhibit 65) as the river of 1852, and there are no old channels or depressions along the line indicated as the river of 1852 as claimed by Texas, the indications on the ground being that the river in 1852, if it occupied the position claimed by Texas, had changed its position to the position occupied by it in 1905 by gradual changes through accretion and not by an avulsive change, and that in said territory between the south line

of the Canutillo Grant and Piedras Paradas the only avulsive changes which affiant was able to testify to were the changes which occurred subsequent to 1905, and affiant further stated that from his observation on the ground during the period beginning at about 1900 and extending down to date, it was his opinion that if the river occupied in 1852 the position claimed by Texas, as shown by the map (Defendant's Exhibit 65), then it had changed its position to the position which it occupied in 1905 by accretion and not by avulsion.

V.

While the motion to reopen the case and to introduce the additional testimony was made by the complainant, the State of New Mexico, it is revealed by the motion of amicus curiae to be permitted to orally argue the case in this court that the actual moving party was L. M. Crawford. This is further revealed by the fact that complainant has filed no brief on the additional testimony taken by reason of its motion and the order of this court, and by the fact that a brief has been filed by amicus curiae L. M. Crawford. In paragraph 3 of the motion of L. M. Crawford to present in this court an oral argument in support of his written brief, is found the following: "The record of this testimony is now being printed under the direction of the clerk of this court at an estimated cost of $775. L. M. Crawford has personally borne the expense of this additional hearing, including the expense of the referee's charges for taking the testimony and the cost of printing of the record. Such expenses have amounted to a little more than $1500; and in addition thereto L. M. Crawford has paid for the surveying and for attorney's fees involved in connection with this matter, the amount of such additional expense being more than $7500." And paragraph 4 of said motion reads as follows: "The present reasonable value of the land which is involved in the issues presented by this new testimony and by the brief being prepared by L. M. Crawford is more than $120,000, and this land, if it is in the State of New Mexico, be-

longs to L. M. Crawford, whose title is entirely dependent upon the success of the State of New Mexico in this suit."

ARGUMENT.

It appearing that the motion of L. M. Crawford for leave to file brief and additional evidence herein, and the motion of the State of New Mexico to correct testimony and take additional testimony of the witness R. J. Owen, is for the sole benefit of L. M. Crawford, and that therefore all of the proceedings had under said motions of L. M. Crawford and the complanant are for the purpose of permitting an intervention by an individual in this cause, and that, therefore, none of the proceedings, the evidence nor the brief of amicus curiae should be nor could be properly considered by this court because it would amount to an individual bring a suit against the State of Texas, which is specifically prohbited by the Eleventh Amendment to the Federal Constitution.

It now appears that the complainant, although the moving party, does not consider the additional testimony introduced at the behest of amicus curiae of sufficient importance to be given any consideration whatever, as is evidenced by the fact that the complainant has not briefed the additional testimony nor the issues raised thereunder, if any, and there is not a line in this record to show that the complainant either approves or acquiesces the position of amicus curiae. It not only does not brief the question but does not show in the brief of amicus curiae and after its motion filed herein is silent.

If the new issue introduced into the case and the new testimony adduced is of sufficient importance to receive and consideration at the hands of this court, the things to be determined are, first: WAS THERE A RIVER OF 1905 FROM THE SOUTHWEST CORNER OF THE CANUTILLO GRANT TO PIEDRAS PARADAS, AND DID THE SAID RIVER OF 1905 FOLLOW SUBSTANTIALLY THE COURSE AS SHOWN ON COMPLAINANT'S EXHIBIT NO. 280? Second, IF THERE WAS ACTUALLY IN EXISTENCE IN 1905

THE RIVER OF 1905, WHICH WAS THE MAIN CHANNEL OF THE RIO GRANDE AT THAT DATE FROM THE SOUTHWEST CORNER OF THE CANUTILLO GRANT TO PIEDRAS PARADAS, DID THE SAID RIVER AS THERE SHOWN REACH ITS POSITION BY ACCRETION?

I.

Was There a River of 1905 *From the Southwest Corner of the Canutillo Grant to Piedras Paradas, and Did the Said River of* 1905 *Follow Substantially the Course as Shown on Complainant's Exhibit No.* 280?

For the purpose of emphasizing the issue found in the "Additional Testimony," the affidavit of R. J. Owen, attached to complainant's motion to correct testimony and take additional testimony, is here again set out in full:

"The State of Texas,
County of El Paso.

"I, R. J. Owen, being duly sworn, state upon oath that I am the same R. J. Owen, known as Richard J. Owen, who testified as a witness on behalf of the State of Texas in the taking of the testimony in the case of the State of New Mexico against the State of Texas, now pending in the Supreme Court of the United States, and I am the same Richard J. Owen who, as shown on page 2625 of the Transcript of the Record in said cause, took the witness stand in said cause on or about the 12th day of December, 1914, and I am the same R. J. Owen who prepared Texas Map Number 3, which was introduced in evidence in said cause and which is marked 'Defendant's Exhibit No. 65,' and I state upon oath that, as shown by the testimony given by me in said cause, particularly on pages 2628, 2652, and 2654, 2671 and 2680, I testified in said cause with reference to the position of the Rio Grande River in 1905, and I testified that the river line denoting said river of 1905, as shown on said map, was in accordance with my survey made on the ground beginning at a point directly west of the south line of the Canutillo Grant and extending northerly to the thirty-second parallel of latitude. And I also testified in said cause that I surveyed the river of 1905 and showed the said line on said map correctly, beginning at the

point marked 'Piedras Paradas' and extending down to the south end of said map, but I also testified that I did not claim that the river line against the foothills, which is shown on said map between the south line of the Canutillo Grant and Piedras Paradas was the line of the river in 1905, and I now state, under oath, that said parallel lines bordering the foothills and which appear on the map to be a continuation of the 1905 river do not correctly show the position of the river in 1905 and thereafter, as between the south line of the Canutillo Grant and Piedras Paradas, and I further state that there were indications on the ground of old river beds along near the line of the foothills on the west side of the valley, but from the appearance of said old river beds it was and is impossible to state whether or not the main channel of the river ever flowed over near the foothills, and it would be impossible to state whether the depressions now the ground and which were on the ground when I first became familiar with this territory, were made by the main channel of the river, or whether such depressions were made by high water in flood time, or whether they were made by water flowing down from the foothills from rains, and it is impossible to state what caused said depressions, and between Piedras Paradas and the south line of the Canutillo Grant said depressions have never been as well defined, or as regular, or as continuous, as they are to the north of the south line of the Canutillo Grant.

"And I further state, upon oath, that I was familiar in 1905 with the location of the Rio Grande, between the south line of the Canutillo Grant and Piedras Paradas, and was familiar with the line occupied by the river in 1905 at the time of trial of the boundary suit between Texas and New Mexico, and am still familiar with the position occupied by said river in 1905, and I have prepared a map which is attached hereto, and which is signed by me, or rather the blue print of said map is attached hereto, and said blue print, which is attached hereto, correctly shows the position occupied by the Rio Grande River in 1905, and the river line of 1905 is on said map named, and is further distinguished by the shadings as shown on said map.

"I further state, upon oath, that about 1905 the Rio Grande River, by an avulsive change, changed its location from the line marked 'Rio Grande 1905' to a position such as shown on Defendant's Exhibit No. 65, with the exception that up until about 1909 the river continued to run around the channel occupied in

1905, beginning at about the intersection of the west line of survey No. 156 with said river channel and continuing on around to the east of the Country Club property and continuing on around back across what is marked 'Survey No. 156' and what is marked as 'Survey No. 156' to the channel now occupied by the Rio Grande River, as shown on said maps, and, subsequently, between 1909 and 1911, or at approximately that date, by an avulsive change, the river left its channel which passed to the east and south of the Country Club building and went over and occupied a position approximately such as is shown on the map as the present channel of the Rio Grande River, and the position of the Rio Grande in 1905 and the position of the river around the Country Club in 1909 as indicated on the map as the river line of 1905, and on the ground said former channel may be plainly seen at this time practically the entire extent of the course of said river of 1905, except where land has been graded, leveled and placed in cultivation, and even in those places the position of the river of 1905 may be distinguished on the ground for practically the whole distance. On the map the line of the river of 1905 is clearly indicated by distinctive shadings of the lines and by words designating said river line.

"I further state, on oath, that said map shows certain Texas surveys as extending across the line of the river of 1905. Said lines are not placed upon said map as true indications of the positions that said surveys should occupy, but are placed upon said map to show where the Texas claimants are claiming that said Texas surveys extend; and I am familiar with the field notes of said Texas surveys and know that there is not sufficient land in the valley to include said Texas surveys between the west boundary of the valley and the Canutillo Grant lines.

"And I further state, on oath, that, between the south boundary line of the Canutillo Grant and Piedras Paradas, there are no indications on the ground at the present time of any river channel along the line indicated on the map as the river of 1852, being the position claimed for that river by the State of Texas; and there are no old channels or depressions along the line indicated as the river of 1852 as claimed by Texas, the indications on the ground being that the river, if in 1852 it occupied the position claimed by Texas, then it changed its position to the position occupied by it in 1905, within the territory above indicated, by gradual changes through accretion, and not by an

avulsive change, and that in said territory between the south line of the Canutillo Grant and Piedras Paradas the only avulsive changes which I am able to testify to are the changes which occurred subsequent to 1905, as indicated above.

"From my observations on the ground during the period beginning at about 1900 and extending down to date, it is my opinion that if the river occupied in 1852 the position claimed by Texas, as shown on the map, then it changed its position to the position which it occupied in 1905 by accretion and not by avulsion.

"I further state, upon oath, that from the point where the shaded line showing the river of 1905 comes to an end at a point where it returns to the Rio Grande of the present date, and being the southern extremity of the shaded line, down to Piedras Paradas, there is no indication of an avulsion change, but the river has at all times apparently continued to run in approximately the same position as it now occupies, and if it occupied the position in 1852 as claimed by Texas, and as shown on said map, then its present location has been reached apparently by accretion, and said map shows the position which the river occupied in 1852 as claimed by Texas, and also shows the position occupied by the Rio Grande in 1923, and on said map the line which is designated 'Rio Grande in 1852' represents the line of the river in 1852, as such line is claimed by Texas and by its engineers in this suit.

"RICHARD J. OWEN,

"Sworn to and subscribed before me, this 26th day of November, 1923.

"(Seal) THORNTON HARDIE,
"Notary Public in and for El Paso County, Texas."

(Affidavit is pages 2, 3, 4 and 5 of Record, Vol., "Additional Testimony.")

The witness R. J. Owen after having stated on direct examination that the river of 1905 was running as shown on Plaintiff's Exhibit No. 280 and that he had been familiar with the river running in that location since 1901, where it remained until 1905, except that portion running around to the northeast and southwest of the Country Club, which changed in 1905 (Rec., "Additional Testimony," p. 9), witness stated on cross examina-

tion (Rec., "Additional Testimony," p. 22) that in the early part of 1903, some time in February or March, he was sent out in company with Mr. Z. T. White and visited Colonel Coleman when he was making the survey of the Santa Teresa Grant; that they crossed the river at a point between the old Country Club building and the new club building; that they walked across on a fallen tree where the river was very narrow. The place they crossed, the witness stated, was six or seven hundred feet east of the present Country Club building.

The witness stated also on cross examination (Rec., "Additional Testimony," pp. 28-29) that the channel which he has indicated on Plaintiff's Exhibit No. 280 as the main river of 1905 was about one hundred feet wide. The witness stated that anyway it could be measured across with a hundred-foot chain. The witness admitted (Rec., "Additional Testimony," p. 29) that he had testified in the original investigation that the channel of the main river was ordinarily from two to four hundred feet in width. The witness now states that you would often find it from three to four hundred feet—the average would run, he said, about two hundred fifty to three hundred feet.

Mr. Owen also states (Rec., "Additional Testimony," p. 25) that he began surveying in the vicinity of the Country Club in 1901 and that he surveyed everything running west of Survey No. 155, everything from Frontera, or the old lime kiln, which was in existence at the time he began surveying, and that he had surveyed all the numbers or practically all of them lying west of 155, which would include 157 and 158 and 156. That he had had occasion to study the survey and resurveys in the valley many times; that neither of the surveys, 154, 155, 156, 157 or 158, called for a crossing of a then existing river; that 156 did not call for the crossing of the river; that if witness had surveyed it or resurveyed it and found an existing real river he would have mentioned it; that he would have mentioned the fact that he had crossed the International Boundary Line, and that if he believed a survey crossed the river that he came to he would

certainly cross it and make notes of it. That he had re-run the lines of surveys 156 and 157 more than once.

It seems inconceivable that any surveyor would knowingly cross an International Boundary Line without at least pausing for notation. Mr. Owen did not do this in surveying the surveys numbered above. Therefore, it is almost morally certain that the river of 1905 did not occupy the position shown by Mr. Owen as the main channel of the river at any of the times at which Mr. Owen made a survey or resurvey of any of these numbers.

After showing that the witness R. J. Owen did not consider the line as shown by him to be the river of 1905 on Exhibit No. 280, especially that part extending around to the north and east and southwest of the Country Club the witness on cross examination (Rec., "Additional Testimony," p. 27), in discussing the running of the lines between Surveys Nos. 156 and 157, stated that he took up the line between Surveys Nos. 259 and 157 and ran to the south and crossed a channel—a running channel—which was about 150 feet wide; that he continued on that line to the south and at a further point ran into the Rio Grande. He states that on all of the lines he ran into an old channel with water in it; that it was not hard to cross—it was not deep—that he drove across with the wagon with mules attached. He states further that the only old channel THAT WAS NOT THE MAIN CHANNEL OF THE RIVER AT THAT TIME which was clearly defined and continuous is the one that he mentioned that he crossed so many times with the mules; that there were many numerous smaller channels extending from the northwest to the southeast that they either had to wade across or drive across that the water was pretty deep in and that there was water in all those channels at that time, in the winter of 1909.

The witness states (Rec., "Additional Testimony," p. 29) that the old channel which he had crossed so many times and which he had shown as the 1905 river was carrying water, had been carrying water from up above, he presumed, from waste ditch water. That this channel that he crossed on a tree in 1903 was

carrying water, but he did not go up far enough to see where it was coming from.

Witness states (Rec., "Additional Testimony," p. 30) that the river marked on Exhibit No. 65 flowed east of the Country Club in 1905 and was flowing where he showed it on the map (presumably Exhibit No. 280) in 1905 and that when he first knew this river was in 1909; that it was the river that the flood in 1905 made, the river that ran down east of the Country Club. That after the flood of 1905 settled it was the main channel.

The witness stated (Rec., "Additional Testimony," p. 41) that there was no difficulty whatever when he was making surveys in going north of the Country Club and finding a river bed almost anywhere; that you would find them in most any direction you went; that was also true in recent years. The witness also stated (Rec., "Additional Testimony," p. 40) that the highest land in the valley lying east and west along the Country Club road is where he has put his river; that the slope of the valley is always from north to south and the fall was about four one-half to five feet to the mile continuously from the 32nd parallel to the Courchesne Bridge, with the greater fall the further down you you got and that the river as shown running around the Country Club is not following the natural course and going southeasterly with the fall of the valley but is running across the valley, across the general slope and going over the highest ground in the valley. That the river that he designates as running around the Country Club and shown on Exhibit No. 280 is not distinguished by a channel all the way (Rec., "Additional Testimony," p. 40) and that there are numerous places in the valley with just as distinct old river channels as that, where no one remembers when the river was there and that the finding of a channel at some place not yet filled up and it appearing at another place is no criterion that there was a river there at some time—a continuous river.

The witness stated (Rec., "Additional Testimony," pp. 23-24) that during the investigation that he had made for the State of Texas in 1912 and 1913 he made a traverse of the valley, espe-

cially in the ascertainment of the cause of the old river beds; that this work was done at different times at different places and all tied together at some common point; that there were many channels in places where old rivers had been thrown out from the New Mexico foothills by washings that had come to the old channels that were left and these washes were left during the dry weather, and when the river went down again it would just take a short course and cut across the valley for a time and would eat out these old washes from the hills and especially wash them out and sometimes perhaps not wash them at all. That from his experiences the changes were generally made during flood time; that the witness had in mind one case where an old channel left the New Mexico foothills considerably north of the little town of La Union and cut a channel clear across the valley almost to the present river, and shifted then to the south and came out right near where Gillette's dairy now is and went into the old river of 1886 and stayed there for a while and then must have gotten out in some way towards the New Mexico foothills, because that is where he found it in 1905, prior to the avulsive change.

It seems almost certain from the testimony of R. J. Owen and from the testimony of defendant's witnesses that the river of 1905, shown by Complainant's Exhibit No. 280, as extending around north and east and southwest of the Country Club was, until 1905, either an old channel of the river cut during some avulsive change of the river, and there appears to be numerous such channels in that vicinity, or it could possibly have been one of the channels which witness speaks of as having been caused from a wash from the New Mexico foothills and cut across the valley in that manner and which latter, when the entire valley was flooded, was occupied for a time as the channel of the river, if indeed it ever was the main channel.

The testmony of defendant's witnesses, however, seem to make it certain that the main channel of the river never at any time ran around the Country Club property to the northeast and southwest of same, as shown by Complainant's Exhibit No. 280.

TESTIMONY OF HENRY A. KEZER.

Henry A. Kezer who testified that he had lived in and had been acquainted with the valley in the vicinity of the Country Club since 1887 (Rec., "Additional Testimony," pp. 67-68) and that he had first looked at the district known as the Country Club district in 1899; that he gathered mistletoe from 1899 until 1911 in the vicinity of where the new Country Club now is; that he gathered mistletoe from old cottonwood trees, as it did not grow on young trees; that he gathered mistletoe for commercial purposes during all of these years and was shipping same from El Paso to Northern markets; that he would commence shipping the mistletoe about the 28th of November and shipped on until about the 10th of December for use in Christmas decorations. (Rec., "Additional Testimony," p. 69.) The trees were numerous where the Country Club grounds now are and west of it and that they were very old; that he gathered mistletoe within the horn created by the curve that goes around the Country Club, as represented on Plaintiff's Exhibit No. 280; that he gathered some of it on Survey No. 156 and some on Survey No. 157 in 1902 and 1903; that there were trees in that horn 18 inches through and some of them were a good deal bigger but they would average 18 inches. That he gathered mistletoe within the circle that he has described as the horn that carries the yellow line with it on Exhibit No. 280 where the Country Club now is, in 1904; that he had a contract for clearing the land in there in August, 1916, and that they burned out some stumps that were about two feet in diameter within Survey No. 157 and within the curvature of the river, as shown on plaintiff's map. There were hundreds of trees like that.

On cross examination (Rec., "Additional Testimony," p. 72) the witness stated that they never went east of the river; that is, the river proper. On page 77 of the record the complainant's counsel endeavored to make the witness say that the river made a bend around the Country Club, and witness states that he remembers the river making the bend, but it was south of where the Country Club is now.

On redirect examination (Rec., "Additional Testimony," p. 81) the witness states positively that he knows where the new Country Club now is from Plaintiff's Exhibit No. 280; that it is located on Survey No. 156; that he knows that Survey No. 157 lies immediately to the west of that and that he knows that Plaintiff's Exhibit No. 280 shows a river running along the present Country Club road; that he has never seen such river but has been familiar with the territory since 1898, and that there never was any such river running along the Country Club road to the west and eastward of there and around the Country Club, a continuous river, such as is shown on this map. That he is positive that the growth of timber which he has described was in that horn of the river as shown on map 280 and westwardly of the new Country Club houses; that he has identified this location on the ground within one month and has known it during the years since he first saw it and is familiar with it from being in there, from having a pasture in there and cattle and horses in the pasture. That he now lives only about three and a half miles from the Country Club; that there was an old river bed in there east of the Country Club all the time since he has been in New Mexico, but it is an old dry bed; that it was about where the yellow line was but not distinct; there were cuts in it there. He does not know the date (Rec., "Additional Testimony," p. 83) of the river bed, but it must have been years and years ago; that the old slough that was there in 1905 was perhaps 50 or 60 feet wide, maybe, 75; that the river of 1905 came in there in June, 1905; that it came all of a sudden as a result of a very bad flood; that the river swapped beds within the space of about thirty days.

TESTIMONY OF L. W. SMITH.

This witness had lived in El Paso since 1898 continuously up to the time of his examination. (Rec., "Additional Testimony," p. 92.) He has had occasion to visit the valley above El Paso and above Courchesne Bridge and about where the Country Club is located during all the years that he has resided in El Paso from 1901 to 1917. He stated that he would make from twenty-

five to thirty trips a year in that territory hunting and fishing, which was his principal recreation. (Rec., "Additional Testimony," p. 93.) That they would generally go on Saturday afternoons and stay until Sunday night or Monday morning; that he went with different companions at different times. Judge Harper was one of them and C. R. Jones another; that they usually went in the vicinity of Harper's Lake, which is south and west of where the Country Club is now. THAT IN 1905, AFTER THERE HAD BEEN A FLOOD IN JUNE, THE RIVER CAME EAST OF THE COUNTRY CLUB; THAT PRIOR TO 1905 IT WAS OVER TOWARDS THE FOOTHILLS, PRETTY NEAR WHERE IT IS NOW ON THE WEST SIDE OF THE VALLEY, WEST OF THE PRESENT COUNTRY CLUB; THAT AFTER THE FLOOD OF JUNE, 1905, THE RIVER CAME FROM THE NORTH TO A POINT NEAR THE COUNTRY CLUB AND CUT THROUGH A SLOUGH WHERE MR. WHITE HAD BUILT A DYKE AND CAME ON DOWN THROUGH THE SLOUGH, WHERE THE WITNESS AND HIS COMPANIONS HAD FORMERLY FISHED. (Rec., "Additional Testimony," p. 95.)

The witness stated that he had known that slough through which the river of 1905 came three or four years before 1905; that before the time the river cut through in 1905 there was not much water in it; there were several deep holes at different places; he supposed it was 30 or 40 or perhaps 50 feet wide and about one mile long. He thinks it was right above the Country Club, looking east. He knows where the present Country Club is and where the old slough is now as well as he did in early days.

With reference to the Country Club, the slough was a little bit northeast and due east of the Country Club. (Rec., "Additional Testimony," pp. 92-95.) There was another slough about half a mile north of the Country Club towards Canutillo. The witness and his companions went in the district west of the slough about where the Country Club is now every time they went up there. They would go west of the slough three or four hundred yards to get a camping place under the trees. There were many

trees west of the slough of all sizes, two feet twenty inches. Some of them were even larger. The growth of trees went west almost to the river. (Rec., "Additional Testimony," p. 95.) After the flood of 1905 the witness states they would not go to that district but would go around and ford the river at Courchesne or Canutillo.

TESTIMONY OF C. F. JONES.

This witness testified that he has resided in El Paso for forty-four years and has hunted in the district to the west and southwest of White's Spur for forty-three years, and fished all through there; that he first began to hunt and fish in that district in 1882; that they would go two or three times a month and during the hunting season would hunt every Sunday; that in 1903 the river ran along by the sand hills opposite the granite dykes; that in 1905 the river changed its course and came clear over to the Santa Fe tracks. (Rec., "Additional Testimony," pp. 104-105.) That he was acquainted with the slough in 1905 southwest of White's Spur; that it was about 600 yards from the Santa Fe tracks in what was an old bed; that he has known the slough since 1882; that it was from 50 feet to 100 yards in width and knee deep to waist deep in water; that in 1905 the river came across at Canutillo and came into that place. He thinks it remained there for over a year; that he would not have any trouble at the present time in locating that slough. The slough that the witness had reference to where he hunted and used to fish in was southeast of the Country Club about three-fourths of a mile and was the first slough down that way. There was another slough north of that that came right near the railroad track above White's Spur; that slough was almost due east of the Country Club; that he still saw evidences of an old slough and when he was up at the Country Club a short time ago; that the slough that was right near where the Country Club now is is varied in width. Sometimes it would be 100 yards wide and other times not over 50 feet. There were lots of trees and timber in there where the Country Club is now which went west of the river, west or southwest. (Rec., "Additional Testimony," pp. 107-108.)

The river in 1903 ran right up against the sand hills to 1904. In 1905 it broke over about Canutillo and ran down right along by the Santa Fe Railroad until it got close to White's Spur and then went over and to the west; that there was water in that river after 1905,—it went over towards the sand hills. That witness often camped near where the present Country Club site is now in a grove of large trees there. The trees were from one and a half feet in diameter to two and a half feet. He is certain of the location. (Rec., "Additional Testimony," p. 110.)

On cross examination, it was brought out that the timber witness was speaking of was all east of the river; that there was no timber on the west side of the river; that after crossing the river he went into the sand hills and mesquite brush and sage brush and on the east side it was all trees. (Rec., "Additional Testimony," p. 120.)

THOMAS W. ZIMPLEMAN (Rec., "Additional Testimony," pp. 88-93.)

This witness now lives in El Paso, where he has been living for about eight years. Prior to that time he lived in Socorro district. He moved there in 1911. Prior to that time he lived at Canutillo for about thirteen years on the Canutillo Grant, about two miles north of White's Spur. He lived there seventeen years; moved there in 1898. His father owned land there on which witness lived. That during the time he lived there he was well acquainted with the valley to the south of Canutillo and was acquainted with the section where the Country Club now is; that he had traveled through there a good deal from 1898 up to 1904. In 1904 he lived at Canutillo. There was a change in the river at that place that was caused by a big cloudburst up at La Union that filled the river with sand. The river at that time ran right along next to the foothills, right in the foothills. The effect of the cloudburst was to change the channel of the river; made the river go east. It did not cut east that year but in 1905, the year the flood came. When it came down to witness' place it bursted over and went down around by the new

Country Club, leaving the Country Club on the west side of the river. Prior to that time it came up next to the foothills; that it run east of the Country Club since 1905.

II.

If There Was Actually in Existence in 1905 the River of 1905, as Shown in Complainant's Exhibit No. 280, Which Was the Main Channel of the Rio Grande at That Date From the Southwest Corner of the Canutillo Grant to Piedras Paradas and More Especially as Was Shown Around the Country Club, Did the Said River as There Shown Reach That Position by Avulsion or Accretion?

The witness R. J. Owen states in his affidavit on which complainant's motion to take new testimony is based (Rec., "Additional Testimony," pp. 2-5) that if the river in 1852 occupied the position claimed by Texas, then it changed its position to the position which it occupied in 1905 by accretion and not by avulsion. However, after the witness had been put on the stand, his testimony did not sustain this position. On the other hand, it may be reasonably deduced from the witness' testimony that the river of 1905 as shown on his map, and especially that part running around east, north and south of the Country Club, was simply a series of old sloughs or depressions, the remains of various old river beds left in that area or depressions caused by washes from the arroyos in the hills which was occupied by the river for a time following the flood of 1905. There is no testimony that the old slough or depressions around the Country Club were connected up so as to make a continuous river prior to 1905, and even the witness Owen is not certain that the main channel of the river occupied the place as shown by him on Exhibit No. 280 around the Country Club until 1905. There is no evidence tending to show or indicate that the river of 1905 as shown around the Country Club buildings could have reached that position by accretion. The witness testified that there were

many old river beds through the valley and near the points in controversy (Rec., "Additional Testimony," p. 15); that they were there when he first commenced to work there and since the receding of the waters after the avulsive change of 1905, but he does not know how old they are or when they were formed. It is true, the witness says (Rec., "Additional Testimony," p. 16), that it looks as though the old river may have eaten its way to the 1905 position by erosion and accretion, but in the same sentence states that where the old river of 1852 struck the foothills further west and was running out with some force on account of the momentum towards the east, it may have gone over and reached over to the east side of the Country Club until it struck permanent soil and the river might have been formed in that way.

The witness says, in effect, that he does not know whether the change was by accretion or otherwise; that he has made no examination of the soil—has had no tests made of the different soil and nothing to form any conclusion from, and further that he is not qualified to state. (Rec., "Additional Testimony," p. 16.)

There was an attempt made to show by the witness that there was no depression now showing where the river bed of 1852 was. However, the witness did state that in some points the old river bed was still visible. It does not seem very important whether or not the depression left from the river bed of 1852 can be seen on the ground at this time or not.

The witness Owen testified (Rec., "Additional Testimony," p. 19) that there is no indication now on the ground of any old river bed along the foothills between the point where the south line of the Canutillo Grant extended strikes the foothills and extending down where the river of 1905 struck the connecting hill line of survey of 6.74 acres, but that on the contrary sand is washed out from the arroyos 600 or 700 feet and has made a high ridge where this old river bed of his time used to be. It is just as reasonable to presume that when the river changed its course to occupy the river of 1905 as shown on complainant's

exhibit No. 280, if it did so change its course and did occupy such channel, that the change was caused by avulsion and that the depression from the old river bed had been filled up by sand from the arroyos, as to presume that there was no depression there from the old river bed because the river had changed by accretion.

We do not believe it is significant as indicative of an accretive change that the alleged river of 1905 in the position it occupied around the Country Club takes the shape of a horn for the reason that it does not appear clear that the river ever occupied this area as its main channel, and it is clear that in 1902 and 1903 these sloughs or depressions shown by complianant as the main channel of the river in 1905 were not a connected continuous line, and it is more reasonable to presume that if this channel ever was occupied as the main channel of the river that the river in the great flood of 1905 occupied these sloughs and washed them out so that they would connect up as one continuous line.

Complainant has attempted to show by the witness Owen that on account of the vegetation to the west of what it alleges to be the river of 1905 around the Country Club that it must have reached that position by accretion, and complainant's witness Owen is authority for the statement that he did not see any old trees between the old depressions formed by the river of 1852 and the river as shown by it around the Country Club as the river of 1905. This is clearly refuted by defendant's witnesses who have been familiar with the territory, some of them since 1882.

Mr. Henry A. Kezer, a witness for the defendant, testified that he gathered mistletoe in that district up to 1904, and that there were a great many old trees in and about where the Country Club now is and immediately west of it. (Rec., "Additional Testimony," p. 69.) And that in 1916 the witness cleared the land in about where the Country Club is now (Rec., "Additional Testimony," p. 71), and took out stumps two feet in diameter. He says that was within Survey 157 and within the curvature

of the river as shown on complainant's map, and that there was about 160 acres of those trees in there.

Defendant's witness L. W. Smith, who had been familiar with the territory in and around the Country Club since 1898 and had visited that territory as many as twenty-five or thirty times a year (Rec., "Additional Testimony," p. 92-95), testified that there were large trees growing three or four hundred yards back west from the slough designated by complainant as the river of 1905 and that the trees were two feet and twenty inches in diameter; that it was a natural growth, an uncut forest, and defendant's witness, Mr. C. F. Jones, who had been hunting and fishing in the vicinity of the Country Club for forty-three years (Rec., "Additional Testimony," pp. 104-108), testified that there was very thick timber in the vicinity of where the Country Club now is; that the timber went west to the river, which ran up against the foothills on the New Mexico side, and that the trees were all the way from a foot and a half to two and a half feet in diameter and that the forest extended back to where the Country Club now is. (Rec., "Additional Testimony," p. 110.)

We cannot agree with the brief of amicus curiae that the quotation from the opinion of this court in the case of State of Oklahoma vs. State of Texas, as the same appears in 43 Supreme Court Reporter, 227, referred to a condition substantially the same or even similar to that which is shown to have existed with reference to the territory to the west of the Country Club; that is, that there is a cutting against a curving bank, a deposit on the inner side or that there is an old growth of trees in the west, then a newer growth, to the east and then the sand bar farther to the east extending to the river bed. The testimony not only of Mr. Kezer but of Mr. Smith and Mr. Jones, which testimony is uncontradicted, is to the effect that there was a heavy growth of timber immediately west and within 300 yards of the west bank of the slough which complainant designated on Exhibit No. 280 as the river of 1905.

III.

The field notes and plats of the Texas Surveys Nos. 157, 259, 260, 261 and 262, and the field notes and plats of the Santa Teresa Grant have already been considered by the defendant in its brief on the original hearing in this case, and do not need to receive further consideration.

The field notes and plats of the above numbered Texas surveys, together with other surveys, is described in Part 1 of the brief for defendants, pages 277-291, inclusive. The effect of the Santa Teresa Grant location is described in defendant's brief, Part 1, pages 257-268, inclusive.

CONCLUSION.

1. It does not seem at all certain from the additional testimony introduced that the river of 1905, as shown on Complainant's Exhibit No. 280, ever occupied as its main channel that part shown to run around the Country Club north, east and south and southwest.

2. If the main channel of the river ever at any time occupied that space shown by complainant on its Exhibit No. 280 as the river of 1905 around the Country Club, then the said river did not reach that position by accretion but in a cloudburst or avulsive change occurring in the year 1905 or 1904 and occupied some old depressions, river beds or sloughs which had been made around the vicinity of the Country Club years before.

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